

MAYOR & COUNCIL AGENDA COVER SHEET

MEETING DATE:

July 7, 2003

CALL TO PODIUM:

David B. Humpton
City Manager

RESPONSIBLE STAFF:

David B. Humpton
City Manager

AGENDA ITEM: (please check one)

<input type="checkbox"/>	Presentation
<input type="checkbox"/>	Proclamation/Certificate
<input type="checkbox"/>	Appointment
<input type="checkbox"/>	Public Hearing
<input type="checkbox"/>	Historic District
<input type="checkbox"/>	Consent Item
<input type="checkbox"/>	Ordinance
<input checked="" type="checkbox"/>	Resolution
<input type="checkbox"/>	Policy Discussion
<input type="checkbox"/>	Work Session Discussion Item
<input type="checkbox"/>	Other:

PUBLIC HEARING HISTORY:

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	
Hearing Date	
Record Held Open	
Policy Discussion	

TITLE:

Resolution of the Mayor and City Council in Support of the Proposal of the Council of Governments for Federal Legislation to Facilitate Mutual Aid Agreements by Limiting Liability in Providing Emergency Assistance Across State Lines

SUPPORTING BACKGROUND:

The Council of Governments (COG) has asked that the City of Gaithersburg support proposed federal legislation that will facilitate mutual aid agreements by limiting liability and providing emergency assistance across state lines. For your review, I have attached a white paper drafted by COG on this issue and a copy of the proposed legislation.

While the City of Gaithersburg currently has a mutual aid agreement in effect with Montgomery County, the events of September 11, 2002, the sniper attacks in the fall of 2002, and the threats of biological attacks highlight the need and value of intergovernmental planning and cooperation.

City Attorney Abrams has reviewed the proposed federal legislation and believes it is in the City's best interest.

DESIRED OUTCOME:

Approve resolution.

RESOLUTION NO. _____

RESOLUTION OF THE MAYOR AND CITY COUNCIL IN SUPPORT OF THE
PROPOSAL OF THE COUNCIL OF GOVERNMENTS FOR FEDERAL LEGISLATION
TO FACILITATE MUTUAL AID AGREEMENTS BY LIMITING LIABILITY IN
PROVIDING EMERGENCY ASSISTANCE ACROSS STATE LINES

WHEREAS, the terrorist attacks on September 11, 2001, the sniper attacks in the fall of 2002, and the threats of biological attacks highlight the need for and value of intergovernmental planning and programming in the region; and

WHEREAS, most of the resources for responding to such disasters are provided by local governments; and

WHEREAS, an *ad hoc* group consisting of Council of Governments (GOG) member governments, the State Attorneys General, and representatives from the Department of Homeland Security have met to consider how to improve intergovernmental mutual aid and address issues associated with immunity of governments and their employees rendering emergency aid; and

WHEREAS, the *ad hoc* group has developed the attached proposed federal legislation to give localities and their personnel greater security to enter into, amend and implement mutual aid agreements;

WHEREAS, the Council of Governments has requested that member jurisdictions take formal action supporting the proposed legislations introduction and passage;

NOW THEREFORE, BE IT RESOLVED, that the Mayor and City Council of Gaithersburg does hereby endorse introduction of the proposed legislation in Congress and requests its legislative delegation and the United States Department of Homeland Security to support such legislation; and

BE IT FURTHER RESOLVED, that the Mayor and City Council directs that the National Capital Region Emergency Preparedness Council, the Coalition of Governments, the legislative delegation, and the Department of Homeland Security be advised in this resolution.

ADOPTED by the City Council this 7th day of July, 2003.

SIDNEY A. KATZ, Mayor and
President of the Council

THIS IS TO CERTIFY that the foregoing
Resolution was adopted by the City Council
in public meeting assembled on the 7th
day of July, 2003.

David B. Humpton, City Manager

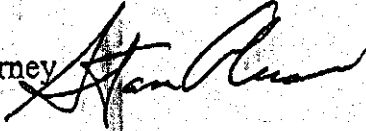


Gaithersburg
A CHARACTER COUNTS! CITY

MEMORANDUM

VIA FACSIMILE & MAIL

TO: David Humpton, City Manager

FROM: Stanley D. Abrams, City Attorney 

SUBJECT: COG Proposal for Federal Mutual Aid Agreement Legislation

DATE: July 2, 2003

With respect to this legislation and the issue of liability, I read the proposed law and supporting material to say:

- (1) That the City and a City officer or employee rendering aid outside of the City pursuant to a Mutual Aid Agreement authorized under this legislation will have absolute immunity from liability and indemnification and reimbursement will be governed by the terms of the agreement.
- (2) That the City and any City officer retain all present immunities as authorized under Maryland statutory and common law where a third party is injured pursuant to the actions of a responding jurisdiction, police or public officer acting in the City of Gaithersburg under a Mutual Aid Agreement. The limited liability and immunities are explained on pages 4 & 5 of the COG White Paper Memo. Consequently, these actions and extent of liability remain unchanged from present law. The issue of indemnification and reimbursement would be covered by the Mutual Aid Agreement.

I hope this clarifies the materials provided to you. It is still my recommendation that we support these efforts to get this legislation passed.

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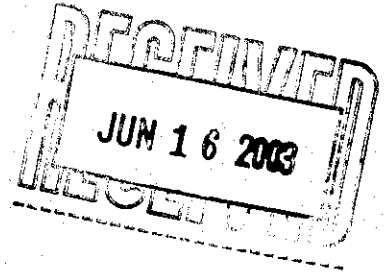
MAYOR
Sidney A. Katz

COUNCIL MEMBERS
Stanley J. Alster
Geraldine E. Edens
Henry F. Marralla, Jr.
John B. Schlichting
Ann T. Somerset

CITY MANAGER
David B. Humpton



Local governments working together for a better metropolitan region



June 13, 2003

District of Columbia
Bowie
College Park
Frederick County
Gaithersburg
Greenbelt
Montgomery County
Prince George's County
Rockville
Takoma Park
Alexandria
Arlington County
Fairfax
Fairfax County
Falls Church
Loudoun County
Manassas
Prince William County

Stanley D. Abrams
Gaithersburg City Attorney
4550 Montgomery Avenue
Suite 760 North
Bethesda, MD 20814

Dear Mr. Abrams:

The inability of local governments to enter into, amend, and securely implement Mutual Aid Agreements has presented a thorny problem for several years. The events of September 11, 2001, and the subsequent efforts to provide regional support for homeland security and emergency response have highlighted the need to address and solve questions of sovereign immunity, indemnification, and reimbursement.

Over the last several months, attorneys representing COG member governments, the State Attorneys General and other state officials, and representatives from the Department of Homeland Security have met to consider potential solutions. This *ad hoc* group has now fashioned a consensus solution – a federal statute that addresses the immunity of governments and their employees rendering emergency aid, and which permits the states and the local governments to elect appropriate levels of indemnification and reimbursement by statute or agreement.

The proposed federal legislation and a supporting white paper (enclosed) were presented to the National Capital Region Emergency Preparedness Council (EPC) on June 5. The EPC has requested that all the region's local governments review this proposed legislation and, if in agreement, take a formal action supporting its introduction and passage.

Please review with your administrative staff and attorneys and present this proposal to your governing body for consideration and, hopefully, endorsement. The COG Board would appreciate notice of any action prior to its meeting of July 9th and the EPC's meeting of July 17th, so that the concurrent positions of the region's governments may be transmitted to the administration and Congress.

If you or your staff have any questions, please contact Lee Ruck, COG's General Counsel, at 202.962.3733, or lruck@mwkog.org.

Sincerely

David J. Robertson
Executive Director

Enc: Proposed Statute
White Paper
Ad Hoc Group Participants

Cc: CAOs
Chief Elected Officials

participate in such agency, from time to time, to address common regional problems and challenges.

"NATIONAL CAPITAL REGION" means the area encompassed by the jurisdictions participating in COG, including the District of Columbia, Frederick County, Montgomery County, Prince George's County, the cities of Bowie, College Park, Gaithersburg, Greenbelt, Rockville, and Takoma Park in Maryland, and the Counties of Arlington, Fairfax, Loudoun and Prince William, and the Cities of Alexandria, Fairfax, Manassas and Falls Church in Virginia, and such other jurisdictions that provide aid to one or more of the aforesaid jurisdictions pursuant to a Mutual Aid Agreement.

"MUTUAL AID AGREEMENTS" means the Agreement(s) authorized under Sections 1.03 and 1.06 for the provision of police, fire, rescue and other public safety and health services to any Party to the Agreement(s) during an Emergency or pre-planned training event.

Sec. 1.03 MUTUAL AID AUTHORIZED

Notwithstanding any other provision of federal or state law, the Governments of the District of Columbia, the cities and counties in the National Capital Region, the Washington Metropolitan Area Transit Authority and the Metropolitan Washington Airports Authority (a Party or Parties), are authorized to enter into Mutual Aid Agreements, to aid each other:

- a) in the provision of police, fire, health, rescue and emergency medical services;
- b) in managing or responding to any Emergency; and
- c) in preparing and training for any of these activities.

The United States and the States of Virginia and Maryland may also join in these Agreements. Other than as described in this Act, the rights and responsibilities of the Parties to a Mutual Aid Agreement entered into under this Act shall be as described in the Mutual Aid Agreement.

Sec. 1.04 DISTRICT OF COLUMBIA

When the Mayor of the District of Columbia declares a state of emergency or when mutual aid assistance is rendered under Section 1.03, the provisions of this Act shall supercede any provisions of existing law, including those imposed by the Federal Antideficiency Act, Section 446 of the Home Rule Act, and the provisions of an Act to provide for a mutual aid plan for fire protection by and for the District of Columbia and certain adjacent communities in Maryland, and Virginia, and for other purposes, as amended, approved August 14, 1950 (64 Stat. 441; D.C. Official Code §5-414), to the extent that the provisions of these existing laws conflict, or are inconsistent, with the provisions of this Act.

Sec. 1.05 LIMITATION ON LIABILITY

No Party or its officers or Employees rendering aid or failing to render aid pursuant to a Mutual Aid Agreement authorized under this Act, nor any Party or its officers or Employees engaged in training activities with another Party under a Mutual Aid Agreement, shall be liable on account of any act or omission to any person or entity.

Sec. 1.06 SUPPLEMENTARY AGREEMENTS

Nothing herein shall preclude any Party to a Mutual Aid Agreement from entering into supplementary Mutual Aid Agreements with less than all the Parties, or with another, or affect any other agreements already in force between states and localities.

The Limitation of Liability provided for in Section 1.05 of the Act shall apply to Supplementary Agreements unless the Supplementary Agreement explicitly provides otherwise.

June 5, 2003

NATIONAL CAPITAL REGION MUTUAL AID AUTHORIZATION ACT

Sec. 1.01 FINDINGS

- (a) The terrorist attacks on September 11, 2001 in New York City and in Arlington County, Virginia, resulting in grievous loss of life and the concomitant disruption of our national and regional services, the sniper attacks in the fall of 2002, and the threats of biological attacks highlight the need for and value of intergovernmental planning and programming in substate regional areas.
- (b) Episodes of this kind require a regional response, and most of the resources for responding to such disasters - manpower, equipment and expertise - are provided by local governments.
- (c) The National Capital Region will continue to be a prime target for terrorists because it is the seat of our national government and the federal interests permeate the whole region.
- (d) Notwithstanding a proud history of mutual aid among the District of Columbia and cities and counties planning and cooperating through their joint agency -the Metropolitan Washington Council of Governments - the provision of mutual aid on a regional basis to respond to terrorism attacks and other emergencies is impeded by the disparate laws of the states and the District of Columbia relating to liability.
- (e) Congress should use its authority to address this interstate problem and facilitate these critical mutual aid responses.

Sec. 1.02 DEFINITIONS

"EMERGENCY" means an Emergency declared by the President or Governors of Maryland, Virginia and/or Mayor of the District of Columbia, or an undeclared emergency, incident or situation within the National Capital Region which triggers Mutual Aid under the terms of a Mutual Aid Agreement.

"EMPLOYEE" means the Employees of the Party, including its agents or authorized volunteers, who are committed in a Mutual Aid Agreement to providing an Emergency response.

"METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS (COG)" means the joint agency of the Governments of the District of Columbia, and the cities and counties in the State of Maryland and Commonwealth of Virginia that

**PROPOSAL FOR FEDERAL LEGISLATION
TO REMOVE THIRD PARTY LIABILITY
AS A LIMITING FACTOR
TO MUTUAL AID AND EMERGENCY ASSISTANCE
BETWEEN AND AMONG THE LOCAL GOVERNMENTS
OF THE NATIONAL CAPITAL REGION**

GOALS OF PROPOSED FEDERAL LEGISLATION

1. Authorize regional Mutual Aid Agreements for Police, Fire, Rescue, Emergency Medical Services, and other services among the governments of the District of Columbia, cities and counties in the Metropolitan Washington Region, Washington Metropolitan Area Transit Authority and the Metropolitan Washington Airports Authority and the United States and States of Virginia and Maryland.
2. Limit liability of the parties to the Mutual Aid Agreements and their employees in making an emergency response or during training for such response.

BACKGROUND

For over forty years local governments in the National Capital Region have entered into formal agreements setting forth the conditions and procedures for providing mutual aid in time of emergency or need. Through the Metropolitan Washington Council of Governments ("COG"), over thirty such agreements have been executed between two or more local governments covering such varied areas as police, fire, rescue, emergency medical, and public works services. Since these agreements were first executed, it has become apparent that the necessary legal authority and protections are not available to give localities security under the legal obligations and issues that are triggered by the agreements.

After the terrorist attacks in New York and Arlington County on September 11, 2001, there was heightened awareness of first responder mutual aid at a greater level than ever before. Governments cooperated because circumstances required mutual aid. Fortunately, the generous and courageous acts of cooperation during these situations did not result in litigation over liability and related issues. Preparation for security during the World Bank demonstrations brought the problem of federal, state, and local government mutual aid into stark focus as well. The sniper incidents in the fall of 2002 were another reminder of the problem and the many ways in which the need for enhanced mutual cooperation and aid may be manifested.

These legal developments gave rise to a series of ongoing concerns about the legal implications of a local government and its employees providing aid to another local

government, particularly when crossing state boundaries. COG member jurisdictions have identified provisions of state law and of the District of Columbia that are an impediment to existing mutual aid agreements for emergency assistance and proposed revisions to those agreements. The problem is not susceptible to effective resolution by the individual Mutual Aid Agreement members; because of the interstate and national security nature of this National Capital Region, they require a federal solution.

The primary legal concerns not susceptible to local or state resolution is that of liability to third parties. Additional concerns are authority, indemnification, and reimbursement. It is our belief that, if the liability issue can be resolved, and existing impediments removed from state law, the states and localities can address the other issues by legislation or agreement. These terms will first be defined below to provide a frame of reference.

Authority

To enter into a mutual aid agreement, a local government must be given the power to do so by its state, or, in the case of the District of Columbia, by the federal government. For the most part this concept is covered by a doctrine known as Dillon's Rule – a longstanding principle of local government law embraced by the jurisprudence of both Maryland and Virginia.

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others:

"First, Those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation – not simply convenient, but indispensable." 1 J. Dillon, *Municipal Corporations*, Section 89 at p. 145 (4th ed. 1890). See *Smith v. Edwards*, 292 Md. 60 (1981); *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000); *Winchester v. Redmond*, 25 S.E. 1000 (Va. 1896).

To resolve the issues raised by the need for up-to-date, effective mutual aid agreements, requires parallel or compatible authority in all the participating jurisdictions and may require parallel grants of powers from the states and federal government.

Indemnification

Indemnification, in the context of mutual aid, is where the party requesting assistance compensates a party providing assistance for any loss it might suffer. Such loss can be property loss, e.g., a damaged pumper sent across a jurisdictional boundary to respond to a fire, or it can take the form of personal loss, e.g., the wages, overtime, or even medical costs of employees sent to the assistance of the requesting party. Indemnification can be governed by statute, but it is more usually the province of contractual provisions between the parties requesting and furnishing assistance.

Reimbursement

Reimbursement, in this context, refers to the payment of all or a part of the costs of providing emergency assistance by another entity, usually a state or the federal government. Reimbursement is almost always provided pursuant to a statutory or regulatory authorization and formula, and usually requires a senior executive decision to trigger its use, e.g., FEMA regulations permit a partial federal reimbursement, after a presidential declaration of emergency.

Liability

Legal issues of tort liability, in the context of mutual aid, refer to the liability of parties offering assistance under a mutual aid agreement for injuries occurring to third persons in a foreign jurisdiction. For instance, if a Montgomery County, Maryland, fire truck, responding to a major fire in the District of Columbia at the request of Washington's Mayor, is involved in an accident, what law will apply to any dispute over potential liability, what courts might have jurisdiction, and which governments are, in fact, available as potential defendants? Similarly, questions of jurisdiction, procedure, and substantive law arise if Alexandria responds to a District emergency or Fairfax County to a Prince George's County incident.

THE CONCERNS

Authority

For Maryland local governments, police mutual aid agreements require reciprocal indemnification and waiver of claims by each entity against the other; fire mutual aid agreements require waiver of claims in each agreement by each entity against the other and reciprocal indemnification in agreements protecting federal properties, but not in other fire mutual aid agreements. Until recently, Maryland local governments could only agree to enter police mutual aid agreements for declared emergencies. This restriction was eliminated about two years ago. Up until that time, the requirement for a declared emergency precluded certain mutual aid agreements designed to aid the District in handling important national events, such as protecting the Inauguration and its participants.

Virginia local governments, on the other hand, are precluded from indemnification that arises from third party liability. (*1976 Report of the Attorney General*). Indemnification by the District of Columbia is only authorized if there exists insurance for that purpose, which insurance has been obtained by specific budget act.

Liability

Liability to third persons has been a complex and tricky issue for local governments to address. When the requested assistance does not cross state boundaries, the problem has largely been one of agreement between the parties. Since the tort law (and the concomitant issues of local government liability) of each state treats all of its local governments equally, entities providing mutual aid can generally agree on factors which define or limit tort liability, including agency, respondeat superior, and ultimately indemnification. If problems arise requiring a legislative solution, the solution lies in the hands of a single state's legislature.

When the requested assistance crosses state boundaries, however, a series of problems arise. Most of these are founded in the reality that the constitutional, statutory, and case law affecting the liability of local governments and their employees differs radically among Maryland, Virginia, and the District of Columbia.

Virginia: The Virginia common law provides that counties enjoy sovereign immunity from tort liability claims in all of their activities.

- Counties cannot be sued in tort unless explicitly permitted by statute. *Mann v. Arlington County*, 199 Va. 169, 98 S.E.2d 515 (1957); *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1890); See also *Messina v. Burden*, 321 S.E.2d 657, 660 (1984). This immunity is based on the theory that the sovereign cannot be sued without its consent, and that a designated agency of the sovereign is likewise immune.
- To the extent that a municipality, i.e. city or town, is engaged in a governmental function, the same sovereign immunity applies to the municipality. See *Hoggard v. City of Richmond*, 172 Va. 145, 147, 200 S.E. 610 (1939). Emergency response and law enforcement activities are clearly governmental functions.

District of Columbia: Sovereign immunity from most tort liability claims has been abandoned in the District of Columbia. Only in the case of discretionary functions – those “of such a nature as to pose threats to the quality and efficiency of government in the District if liability in tort was made the consequence of negligent act or omission” – does sovereign immunity still apply. *Wade v. District of Columbia*, 310 A.2d 857, 860 (D.C. App. 1973). This is true for both suits against the District government and against employees of the District.

Maryland: Maryland has a hybrid system of sovereign immunity and specifically authorized liability. By common law a local government in Maryland has immunity for governmental functions, but not proprietary functions, including the construction and maintenance of public roads and sidewalks. *Tadger v. Montgomery County*, 300 Md. 539, 546-48, 479 A.2d 1321, 1324-25 (1984); *Housing Authority of Baltimore City v. Bennett*, 359 Md. 356, 358-60; 754 A.2d 367, 368-69 (2000). Sovereign immunity has been somewhat abrogated by statute:

- When an accident occurs while an emergency vehicle is responding to a call or pursuing a suspect, recovery against a local government can be limited to

state's mandatory insurance minimums (\$20,000 per individual/\$40,000 per occurrence/\$10,000 property damage), or whatever higher coverage may be in place. Md. Cts.&Jud.Proc. Code §5-639; Md. Trans. Code §19-103. The driver of the emergency vehicle is absolutely immune unless the injured party can show gross negligence. *Id.*

- The Local Government Tort Claims Act (Md. Cts.&Jud.Proc. Code Ann. §5-301 *et seq.*) requires a governmental entity to defend and indemnify its employees (including most volunteer firefighters, paramedics, or emergency medical service providers) for any allegation of misconduct that occurs within the scope of their employment (or, in the case of volunteers, within the scope of their service to the local government). This Act also limits the liability of a municipality for such conduct to \$200,000 per individual/\$500,000 per occurrence and requires a potential claimant to provide notice within 180 days of the alleged tortious conduct. Failure to provide such notice is a basis for the dismissal of the litigation.
- Employees retain certain common law immunities, but are generally not immune from suits that involve non-discretionary actions. Thus, most suits in Maryland involving torts under state law are brought against employees and not against the local governments.

These varying systems of tort liability create anomalous and potentially untenable results in the case of mutual aid requested and given across state boundaries. If assisting parties carried their immunity structure with them from state to state, the problems would be minimized. However, since *Biscoe v. Arlington County*, 238 U.S.App.D.C. 206 (1984), this has not been the case.

Biscoe involved the liability of Arlington County and one of its police officers for injuries to an innocent bystander arising out of a high-speed police pursuit of a bank robber into the District of Columbia. The United States Court of Appeals for the District of Columbia affirmed a verdict in favor of the injured plaintiff. The Court held that resolution of the liability issues were under District of Columbia law, not Virginia law, and, therefore, Virginia immunities did not apply. Foreign law in a foreign tribunal were applied against a Virginia law enforcement officer and his employer for activities recognized as legitimate under the common law of both jurisdictions (hot pursuit of a fleeing felon).

Indemnification

Indemnification has also presented a problem for some of the jurisdictions in the National Capital Region. Until last year, the District of Columbia was precluded from indemnifying assisting jurisdictions under the Federal Antideficiency Act, 31 U.S.C. Section 1341 (a)(1)(A), which prohibits the District Government from spending or obligating funds in the absence of Congressional authority. However, in 2002, the Office of Management and Budget interpreted the District's various fiscal authorities to permit

acquisition of insurance to cover the potential of indemnifying other governmental entities, if acquired through a specific budget act for that purpose.

The ability of a Virginia local government to indemnify other governments (or even to enter into an agreement to do so) presents a legal impediment to many mutual aid agreements. By law, absent a statute expressly permitting indemnification, Virginia counties, as subdivisions of the Commonwealth, cannot indemnify other entities against third party claims for injury to person or property, because to do so would improperly waive the counties' sovereign immunity. *See 1976 Report of the Attorney General, 51-52.*

Conversely, the Maryland statute that permits a local government to enter into mutual aid agreements for law enforcement services, requires that such agreements contain a provision that the requesting jurisdiction will defend and indemnify responding officers. This applies Interstate as well as Intrastate. Md. Crim.Proc. Code Ann. §2-105(e)(2)(ii) (formerly Md. Code art. 27, §602B). Although permissible, agreements concerning the provision of fire, rescue or emergency medical services are not required to contain such a provision, except as to agreements to protect federal properties. Md. Code art. 38A, §37(c).

SEARCHING FOR SOLUTIONS

For over eight years, attorneys representing COG and its member governments have been wrestling with the seemingly insoluble problems presented by trying to accommodate the statutes and case law of three jurisdictions in order to utilize and expand mutual aid. A number of contractual amendments have been suggested over the years, but have met with objections from one or more jurisdiction's counsel.

Meanwhile, managers, police chiefs, fire chiefs, and other local government officials have been trying to provide maximum mutual support in emergency circumstances, as well as providing timely backup to normal public safety operations. However, many of the existing COG-initiated mutual aid agreements are outdated; and many other functions need to be addressed on an interjurisdictional basis. The local government attorneys have been loathe to confirm the legal sufficiency of amendments to existing agreements or of new agreements because of the underlying legal inconsistencies outlined above.

The Council of Governments' July 30, 2002 GAP Report appropriately indicated:

"Until the question of indemnification for responding mutual aid jurisdictions is addressed it will be difficult to revise or draft mutual aid agreements and plans. Jurisdictions need to know they will be exempt from liability should they respond to an emergency and also in cases of

pre-planned events (e.g. inaugurations, World Bank meetings) which may require responses prior to a state of 'emergency'"

The Existing Interstate Compact is Not Sufficient

The current Emergency Management Assistance Compact (EMAC) is an attempt to deal with these issues. It does address certain issues of liability, limitation and indemnification when states or local governments render assistance *at the specific request of a governor (or mayor, in the case of the District)*. Maryland and Virginia were early state signatories to EMAC; after the indemnification issue was resolved as indicated above, the District of Columbia has now become a signatory. (Forty-nine states, the District, the Virgin Islands, and Puerto Rico are now members of EMAC.)

There are at least two major reasons why EMAC does not resolve the concerns of the attorneys for the governments in the National Capital Region:

By its terms, EMAC only applies to assistance rendered pursuant to a gubernatorial declaration:

"[T]o provide for mutual assistance between the states entering into this compact in managing any emergency or disaster that is duly declared by the governor of the affected state(s), whether arising from natural disaster, technological hazard, man-made disaster, civil; emergency aspects or resources shortages, community disorders, insurgency, or enemy attack." *Emergency Management Assistance Compact, Article I.*

Although local governments and their employees are covered within the definition of state (and Washington's Mayor is deemed a governor for purposes of the compact), EMAC does not cover instances of regional emergency that do not rise to the level of a "statewide" or "interstate" emergency requiring gubernatorial declaration. A major fire, a beltway chemical spill, or a hospital bomb threat may be sufficient to trigger assistance under an existing or proposed inter-local mutual aid agreement but any protections offered by EMAC will not flow unless the affected governor declares the emergency.

EMAC only partially addresses the issues of liability and reimbursement:

"Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross

negligence, or recklessness." *Emergency Management Assistance Compact*, Article VI.

"Any party state rendering aid in another state pursuant to this compact shall be reimbursed by the party state receiving such aid for any loss or damage to or expense incurred in the operation of any equipment and the provision of any service in answering a request for aid and for the costs incurred in connection with such requests . . . Article VIII expenses [injury compensation and death benefits] shall not be reimbursable under this provision." *Emergency Management Assistance Compact*, Article IX.

Therefore, under EMAC, a question exists whether the liability limitation adequately protects the local governments in the National Capital Region. Litigation may still be filed in a foreign jurisdiction. Local governments or their employees may be required to expend time, money, and other resources in defending lawsuits, even if ultimately dismissed. Courts, unused to the specific liability provisions of the differing jurisdictions, may render inconsistent judgments. Many of the emergency incidents that concern localities cannot reasonably be deemed testing or training activities under EMAC. Attorneys concerned about these potential negatives cannot in professional conscience recommend executing interlocal agreements based upon EMAC.

RECOMMENDATION

Most recently an *ad hoc* group of attorneys and other government representatives has met to address these issues and to recommend a possible solution.

The group has included most of the attorneys representing the eighteen COG jurisdictions (all were invited and have been furnished ongoing materials), the Emergency Management Directors of Maryland, Virginia, and the District of Columbia, representatives of the two state Attorneys General, the Director of the Office of National Capital Region Coordination of the Department of Homeland Security, as well as a staff attorney of that Department. Participation was also offered to the Department of Justice and to other affected federal agencies.

Potential solutions considered, and rejected, have included:

- Possible amendments to EMAC to authorize drilling down to local government declared emergencies.
- Possible amendments to EMAC to preclude any liability on the part of governments or employees rendering requested assistance.
- Adoption of an additional regional interstate compact to address the specific needs of the National Capital Region.
- Parallel revision of the tort liability provisions of the two states and the District of Columbia by the state legislatures, the D.C. Council, and Congress.

The discussion then turned to the solution of a single federal statute, bottomed on the unique needs and requirements of the National Capital Region, to address the communal needs of the Region's local governments and their employees.

After several months of meetings, discussions and exchanged drafts, the *ad hoc* group, including the two State Attorneys General representatives, recommend Congressional enactment of a statute which would do the following:

- Assert findings that demonstrate the uniqueness of the National Capital Region and describe the Federal interest in assisting in the resolution of these concerns.
- Set forth the definitions needed for fair and valid construction of the statute, including a specific definition of the National Capital Region which allows contiguous mutual aid beyond the current boundaries when required.
- Specifically authorizes interlocal mutual aid agreements, regardless of requirements for or limitations on indemnification, and authorizes state or federal agencies to participate as well when appropriate.
- Specifically permit the District to enter into such agreements without violating the Antideficiency Act.
- Provides for absolute immunity for jurisdictions and employees rendering assistance, leaving to the statutory or common law of each jurisdiction to fashion agency or *respondeat superior* liability on the part of the requesting jurisdiction if such is desired as a matter of public policy.
- Acknowledges existing mutual aid agreements and provides for future supplementary agreements.

The *ad hoc* group recommends enactment of the attached legislative language, in the earnest belief that the interests of federal, state, and local government entities are best served by this solution. Perhaps, most importantly, we believe that the residents of the National Capital Region will be better protected by well planned, well documented, and well executed mutual aid – mutual aid given under a statute which protects the legal and financial integrity of the participating governments.

NB: This paper was prepared with assistance from Sharon Pandak, Prince William County Attorney, Jay Creech, Assistant County Attorney, Prince George's County, Steve MacIsaac, Arlington County Attorney, Chuck Thompson, Montgomery County Attorney, and the Office of Arabella Teal, Interim Corporation Counsel, D.C. The information was consolidated and this draft prepared by Lee Ruck, General Counsel, MWCOG, who bears responsibility for any error herein.